LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
DEC 13 1948
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1948

No. 223

JOY OIL COMPANY, LTD., Petitioner,

vs.

STATE TAX COMMISSION

On Writ of Certiorari to the Supreme Court of the State of Michigan

BRIEF FOR STATE TAX COMMISSION

Eugene F. Black, Attorney General of the State of Michigan

Edmund E. Shepherd, Solicitor General of the State of Michigan

Daniel J. O'Hara, Assistant Attorney General

Counsel for State Tax Commission.
Lansing, Mich.

Dale H. Fillmore, Corporation Counsel for the City of Dearborn,

Joel K. Underwood, Deputy Corporation Counsel,

Of Counsel.

Subject Index of Matter in Brief

	Page
I Opinions below	1
II Jurisdiction	2
III Counter-Statement of the Case	2
IV Question presented	8
V Summary of the argument	9
VI The Argument	11
VII Conclusion	22

Table of the Cases

A. G. Spalding & Bros. v. Edwards, 262 U.S. 66 ..... 9, 13, 16

American Steel & Wire Co. v. Speed, 192 U.S. 82 10

Austin, Chas. E., Inc. v. Secretary of State, 321 Mich. 426; certiorari denied No. 224 Oct. Term 1948 ..... 2, 6

Bacon v. People of the State of Illinois, 227 U.S. 504 10

Brown v. Houston, 114 U.S. 622 ..... 10, 16

Builderup v. Pathe Exchange, 263 U.S. 291 9

Carson Petroleum Co. v. Vial, 279 U.S. 95 ..... 9, 10, 14

	Page
Champlain Realty Co. v. Brattleboro, 260 U.S. 366	19
Chas. E. Austin, Inc., v. Secretary of State, 321 Mich. 426; certiorari denied, No. 224 October Term 1948	2
Coe v. Errol, 116 U.S. 517	10, 13, 16
Cornell v. Coyne, 192 U.S. 418	16, 17
Diamond Match Co. v. Ontonagon, 188 U.S. 82	10
General Oil Co. v. Crain, 209 U.S. 211	10
Independent Warehouses, Inc., v. Scheele, 331 U.S. 70	10
Joy Oil Co., Ltd., v. State Tax Commission, 321 Mich. 335	1
Minnesota v. Blasius, 290 U.S. 1	19
Railroad Commission v. Worthington, 225 U.S. 101	9
Richfield Oil Corporation v. State Board of Equalization, 329 U.S. 69	9, 10, 11, 13, 15, 16, 17
So. Pac. Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498	9, 13
Spalding & Bros. v. Edwards, 262 U.S. 66	9, 13, 16
Susquehanna Coal Co. v. South Amboy, 228 U.S. 665	10
Texas & N.O. R. Co. v. Sabine Tram Co., 227 U.S. 111	9, 12
Turpin v. Burgess, 117 U.S. 504	16
Von Hamm-Young Co., Ltd., v. City of San Francisco, 29, Cal. 2d 798, 178 P. 2d 745, 171 ALR 274	20
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86	8

3

Statutes & constitutional provisions cited

Page

Federal:

Constitution of the United States, article 1, § § 9 and 10, Export-Import Clauses 4

Mich.

Act 360, Pub. Acts Mich. 1927, 1 Comp. Laws Mich. 1929, § 3710 et seq., Stat. Ann. (Henderson) § 7.631 et seq., creating the Michigan State Tax Commission 4

Michigan, General Property Tax Law, § 152, 1 Comp. Laws Mich. 1929, § 3547, Stat. Ann. (Henderson) § 7.210, authorizing review of assessments, by State Tax Commission 4

Idem., § 8, 1 Comp. Laws Mich. 1929, § 3396, Stat. Ann. (Henderson) § 7.8, providing for tax here in question 4

4

Court Rules

Mich. Court Rule 60, § 6, prescribing procedure on appeal from administrative boards (State Tax Commission) to the Supreme Court of Michigan 3

Supreme Court of the United States

October Term, 1948

No. 223

JOY OIL COMPANY, LTD., Petitioner,

vs.

STATE TAX COMMISSION

On Writ of Certiorari to the Supreme Court of the State of Michigan

---

BRIEF FOR STATE TAX COMMISSION

I

Opinions Below.[*]

The opinion of the court below is officially reported as *Joy Oil Company, Ltd., v. State Tax Commission*, 321 Mich. 335.

It should also be noted that the record of the State Tax Commission, filed in the court below by the officer having custody thereof, pursuant to Michigan Court Rule No. 60, § 6, included a "photostatic copy of File No. 306,985, Wayne County (Circuit Court in) Chancery" (28, see lines 9 and

---

[*] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the printed transcript of record.

10 from top), *viz.*, the trial court file in the cause of *Charles E. Austin, Inc., v. Secretary of State*, 321 Mich. 426; certiorari denied by this Court in No. 224, October Term, 1948.[1]

We, therefore, respectfully submit that we should be free to refer to the related, if not companion, case of *Austin* as our authority for certain factual statements.[2]

II

Jurisdiction.

We accept the jurisdictional statement of counsel for petitioner.

III

Counter-Statement of the Case.

We deem it necessary to correct a few inaccuracies and omissions in the statement of the other side (Court Rule No. 27, par. 4).

1. Counsel's statement of the case, brief, pp. 2-4, is based largely upon the 'Concise Statement of Procedure and

---

[1]

The two cases, though not consolidated, were submitted to the Michigan Supreme Court on the 6th and 7th days of April, 1948, and they were decided May 18 (Joy Oil) and June 14 (Austin) of that year.

[2]

This should be in order for the further reason that the report (16-20) of the tax examiner, refers repeatedly to the Austin record and draws therefrom certain undisputed facts which doubtless influenced the State Tax Commission in making its final order.

Facts' (3-4) which formed a part of his application (1-2) for leave to appeal from the administrative order of the State Tax Commission, to the Michigan Supreme Court.

Such a statement, however, constitutes no part of the record of that commission, which was reviewed by the court below,[3] and it therefore possesses little, if any, probative force.

It might, therefore, prove helpful to explain precisely what procedural steps led to a judicial review of the final order of the State Tax Commission, bearing in mind that since the printed record does not contain any transcript of testimony relating the facts in detail, we must depend upon findings (16-20) of the commission's tax examiner.

Such procedural steps, chronologically arranged, were as follows:

June 7, 1947, the Joy Oil Company, Ltd., petitioner herein,

---

[3]

Michigan Court Rule 60, § 6, provides (so far as pertinent here):

"Sec. 6. To obtain leave to appeal to the Supreme Court from an order or award of the department of labor and industry or to review the action of any other administrative board, . . . the appellant shall . . .:

(a) File in the Supreme Court an application for leave to appeal, setting out the reasons and grounds of appeal, accompanied by the original record, certified as correct by the officer having custody of the original, with supporting brief.

The certified record shall include all documents, files, pleadings, testimony, opinions of the board or officer, except such as may be summarized or omitted in whole or in part by stipulation of parties.

The certified record shall be separate from the petition for leave to appeal . . ."

filed with the Michigan state tax commission,[4] a written complaint (13) which constituted an appeal[5] from an assessment made by the City of Dearborn, Wayne County, Michigan, on certain personal property described in the complaint as "gasoline stored in a bulk plant pending transshipment to Canada".[5a] The reason for appeal was stated to be "that commodities in foreign commerce coming temporarily at rest in Michigan pending trans shipment to a foreign country are not subject to local taxation", and that such an assessment contravenes the Export Clauses of the Federal Constitution, Article 1, § 9 (5), and § 10 (2).

June 10, 1947, the secretary of the commission notified (14) the Dearborn board of assessors of such appeal, requested that no taxes be spread against the present assessed value of the property until the commission's investigation had been completed, and stated that statutory notices of hearing would later be served; a carbon copy of this communication was forwarded to counsel for the owner (15).

October 24, 1947, the secretary of the commission notified the interested parties that a review of such assessments had been ordered, and that a hearing was scheduled on October 31, 1947, at 10:00 a. m., in room 1302, Michigan Detroit Office Building, in the city of Detroit (16).

---

[4]

Created by Act No. 360, Pub. Acts Mich. 1927, 1 Comp. Laws Mich. 1929, § 3710 et seq., Stat. Ann. (Henderson) § 7.631 et seq.

[5]

Such a review is authorized by the Michigan General Property Tax Law, § 152, 1 Comp. Laws Mich. 1929, § 3547, Stat. Ann. (Henderson) § 7.210.

[5a]

The personal property tax here in question was assessed under the Michigan General Property Tax Law, Act No. 206, § 8, Pub. Acts 1893, as amended, 1 Comp. Laws Mich. 1929, § 3396, Stat. Ann. (Henderson) § 7.8.

Following such a hearing, at which there was no dispute as to the facts (28, bottom of page), a tax examiner of the commission made a report (16-20) in which, pursuant to instructions from the State Tax Commission, he set forth 'a thorough analysis of this matter'.[6]

Nov. 12, 1947, an assistant attorney general advised the State Tax Commission that, in his opinion (6-10), the City of Dearborn "is not precluded from collecting a tax from (sic) the gasoline in question because of the export clause of the Federal Constitution" (10).

Dec. 3, 1947, in a letter addressed to petitioner's counsel, the secretary of the commission notified the Joy Oil Company, Ltd., that, after investigation and after giving due consideration to all reports and statements submitted at the hearing held in Detroit October 31, 1947, the commission had denied the company's appeal, "it appearing to the commission that the assessment has been made in compliance with law" in accordance with the opinion of the assistant attorney general (5).

Dec. 15, 1947, the petitioner applied (1-2) for leave to appeal from the foregoing order of the commission, such application, under Michigan Court Rule 60, § 6, *supra* (note 3), being based on the certified records of the Michigan Tax Commission, including the file in the case of *Austin*.

Jan. 8, 1948, the court below granted such leave to appeal (11-12).

---

[6] We are informed by the secretary of the commission, and we state it for what it is worth, that hearings of this nature (except where the City of Detroit is involved) are quite informal and that a court reporter or public stenographer is seldom present.

2. Counsel states, brief, p. 2, that the bulk plants in which the gasoline was stored, were "leased by the Joy Oil Company, Ltd., . . . within the city of Dearborn", and that this company is "a Canadian corporation not authorized to do business in the State of Michigan", and that it owns no property within that state, except the gasoline so stored in the bulk plants at Dearborn.

This overlooks the finding of fact (17) that petitioner, though a Canadian corporation doing no business in Michigan, is "controlled by one Charles E. Austin, although the latter owns no stock in the corporation, the stock being held by Mrs. Margret Austin, wife of Charles E. Austin. There is no doubt, however, that Mr. Austin is the guiding hand in the prosecution of this business".

It is also permissible, we think, to consider the following undisputed fact revealed in the court's opinion filed in the case of *Charles E. Austin, Inc., v. Secretary of State*, 321 Mich. 426, 430:

> ". . . Charles E. Austin, Inc., is a Michigan corporation with an authorized capital of $10,000. The sole shareholder is Margret P. Austin, the wife of Charles E. Austin, who holds all of the stock as trustee for her children. She is also president and secretary of the company. It is engaged in the wholesale gasoline business in the city of Detroit. . . . The Joy Oil Company, Ltd., obtains gasoline from suppliers in Michigan and, also, by railroad tank cars from outside the state of Michigan. When the gasoline was shipped by rail to Detroit it was stored in the tanks leased by it from Margret P. Austin, pending trans-shipment by boat to Canada. For further detailed facts, see *Joy Oil Company, Ltd., v. State Tax Commission*, ante, 335".

3. On page 3 of his brief, first paragraph, counsel for petitioner points out that at the time of purchase from the Midwest Refineries, the Joy Oil Company, Ltd. furnished the seller

> "an Exemption Certificate, duly sworn to, and also a Temporary Exemption Certificate, Form 798 U.S. Treasury Department, Bureau of Internal Revenue, duly sworn to, to comply with (a) the requirements of the Federal Manufacturers Excise Tax, and (b) to the carrier in compliance with the Federal Railroad Transportation Act (4)x".

He also states that the gasoline was transported "upon export bills of lading marked 'For export to Canada'", but it should be noted, we think, that while the uniform straight bill of lading (23) bore the phrase "For export to Canada", the designated destination was "Joy Oil Co., Ltd., c/o Miller Road Terminal, . . . Detroit", and that no Canadian port of entry was named in the bill of lading, nor was the shipment consigned to any person in any village, town, or city in the Dominion.

4. We would add that at a hearing before the Dearborn board of review Mr. Austin (17)

> "appeared in person and admitted the existence of approximately 1,680,000 gallons of gasoline in three or four tanks located at the Miller Terminal in Dearborn. His testimony has further brought out the fact that this gallonage has been accumulated over a fifteen-month period from January, 1946, during which period slightly over 10% of the gasoline was drawn out for export to Canada. It was further pointed out at the aforementioned hearing that of the four gasoline storage tanks located at Miller Terminal in Dearborn the

gallonage in Tank 2 which contained 108,000 gallons on April 1 was subject to taxation, the latter not having been earmarked by Mr. Austin for trans-shipment to Canada".

5. The court below found from the record that the gasoline was held in the tanks at Dearborn, prior to final shipment by boat to Canada, for approximately 18 months. 321 Mich. 338. The record discloses that fact (25).[7]

Since this Court is bound thereby, *Waters-Pierce Oil Co. v. State of Texas*, 212 U.S. 86, we respectfully invite careful consideration of the clear and concise statement of the facts made by the Michigan Supreme Court in its opinion, 321 Mich. 337, 338.

IV

Question Presented.

Whether a large quantity of gasoline delivered intrastate to a Canadian corporation within a Michigan taxing unit and there held in storage, in the circumstance of this case, for upwards of 15 months, is in such continuous transportation in foreign commerce as to exempt it from local state-municipal taxation by virtue of the Import Export Clause of Article I, § 10, of the Constitution of the United States.

---

[7]

The gasoline had been stored in Dearborn about 15 months when on April 1, 1947, the city assessed it for the ad valorem tax. Shipment to Canada by boat did not commence until July 1, 1947, and it is apparent from the Canadian customs warehouse entries (25) that final shipment was made August 22, 1947.

V

Summary of the Argument.

It is our position that on April 1, 1947, the date of assessment, the gasoline stored in tanks at Dearborn, was not a commodity in foreign commerce but formed a part of the mass of property within the state subject to such taxation:

1. Such personal property, the product of the state, had never actually started in the course of continuous transportation to Canada, either by its surrender to a common carrier, or by marking the bills of lading "For export to Canada" (a self-serving declaration); and its storage for 15 to 18 months, an unreasonable length of time, formed no part of that continuity of transportation essential to designate a commodity as "in foreign commerce"; therefore, the authorities cited in petitioner's brief, p. 5,

Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498;

Texas & N.O. R. Co. v. Sabine Tram Co., 227 U. S. 111;

Railroad Commission v. Worthington, 225 U. S. 101;

A. G. Spalding & Bros. v. William H. Edwards, 262 U. S. 66;

Builderup v. Pathe Exchange, 263 U. S. 291; and

Carson Petroleum Co. v. Vial, 279 U. S. 95,

do not control.

2. Although, to paraphrase the language of the opinion in the *Richfield Case*, 329 U. S. at 76, 78, 79, the Import-Export Clause prohibits every State from laying "any" tax on imports or exports without the consent of Congress, and while it is thus distinguished from the Commerce Clause in that it is not subject to limitations set by the Court upon the latter, "the questions remain whether we have here an export within the meaning of the constitutional provision and, if so, whether this tax was a prohibited impost upon it", id., p. 78; and what the Court said in *Coe v. Errol*, 116 U. S. 517, and in other cases cited in *Richfield*, and in others mentioned below, is deemed by this Court "to be the correct principle governing exports: '. . . goods do not cease to be part of the general mass of property in the State, subject as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey' ", *id.*, p. 79.

Brown v. Houston, 114 U. S. 622;

Diamond Match Co. v. Ontonagon, 188 U. S. 82;

American Steel & Wire Co. v. Speed, 192 U. S. 500;

General Oil Co. v. Crain, 209 U. S. 211;

Cf. *Carson Petroleum Co. v. Vial*, 279 U. S. 95;

Bacon v. People of the State of Illinois,
227 U. S. 504;

Susquehanna Coal Co. v. South Amboy,
228 U. S. 665;

Independent Warehouses, Inc. v. Scheele,
331 U. S. 70.

3. Bearing in mind the close relationship between the Joy Oil Company, Ltd., a Canadian corporation, Charles E. Austin, Inc., a Michigan corporation, Margret P. Austin, the wife of Charles E. Austin, and Charles E. Austin, individually, their previous transactions as disclosed in the case of *Charles E. Austin, Inc., v. Secretary of State*, 321 Mich. 426, together with other circumstances marking their control of the tanks in which the gasoline was stored, and applying the controlling principles of the *Richfield Case*, we respectfully submit that the City of Dearborn was not precluded from imposing the tax in question.

Richfield Oil Corp. v. State Board of Equalization, 329 U. S. 69.

VI

The Argument

Question summarized:

Is personal property subject to local state-municipal taxation when delivered intrastate to a purchaser within the taxing unit and there held in storage, in the circumstances of this case, for upwards of 15 months prior to final shipment to Canada?

As appears from our summary of the argument, we contend that when the non-discriminatory general *ad valorem* tax here in question was assessed by the City of Dearborn, the gasoline which had been stored in tanks at the waterfront of the Detroit River for over 15 months, was not a commodity 'in foreign commerce' within the meaning of the Import Export Clause of the Constitution of the United States.

Point One

The gasoline had not ceased to be part of the general mass of property in the State, and the authorities cited in petitioner's brief, do not control.

The substance of petitioner's argument is that the rail shipment of the gasoline to water's edge of the Detroit River and international boundary line, on bill of lading marked "For export to Canada", followed by its storage in tanks leased to the owner at that point, and its final shipment by boat to Canada, after the lapse of 15 to 18 months, took such goods out of the general mass of property in the State, and together constituted one continuous transportation in foreign commerce. The fault in the argument lies, we think, in its premises, and the decisions of this Court cited in its support may readily be distinguished. A few of such illustrative cases will be considered here.

The shipment of lumber in the case of

> *Texas & N.O.R.R. Co. v. Sabine Tram Co., supra,*
> 227 U. S. 111, 115,

was continuous intrastate from an inland point to a dock near Sabine, Texas, where it "was unloaded from the cars into water of the slip in reach of ship's tackle, ready for loading onto ships. The Sabine Tram Company had no connection with this further carriage or switching of the lumber to the docks after its arrival at the station of Sabine". All the lumber "was in fact unloaded from the cars . . . into the (railroad company's) slips, or upon its docks, in reach of ship's tackle and loaded into the ships previously chartered for the purpose, . . . which steam

ships carried same thence to Europe, where this lumber was applied upon contracts for sale in Europe made before the lumber began to leave Ruliff", id., p. 117. None of the lumber remained in the slip at Sabine, or on the docks, except for the time necessary to await the arrival of the particular ship which had previously been chartered and designated to carry that particular lumber to Europe.

The Court, holding that the lumber destined for export acquired the character of foreign commerce as soon as it actually started for its destination, because of the continuous line of shipments through the same port to foreign ports, showing a continuity of transportation, drew marked lines of distinction, 227 U.S. 125, between the case of *Sabine*, the analagous case of *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, and the case of *Coe v. Errol*, 116 U.S. 517, on which we here rely, and which later guided this Court in formulating the principles which controlled

Richfield v. State Board of Equalization,
329 U.S. 69.

The same distinction lies between the case of *Sabine*, *supra*, and the case at bar, and it underlies all of the decisions cited in petitioner's brief.

One of those decisions, for which a great deal is claimed,

A. G. Spalding & Bros. v. Edwards, 262 U.S. 66,

was based primarily on the fact that the merchandise had been committed to a carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. And it did not matter that the title to the goods was in a corporation who might

"change their mind and retain" the goods for their own use, because there was not the slightest probability of any such change and it did not occur. "Theoretical possibilities may be left out of the account", said the Court.

Although the Court, in

Carson Petroleum Co. v. Vial, 279 U.S. 95,

held that the continuity of the journey in transporting oil from interior points to storage tanks for export by ship was not broken by such storage, the commodity in that case, unlike the case at bar, was all bought and held to fill foreign orders previously received; none of it was or could be otherwise disposed of at the port, and "the storage was but a necessary means of securing *prompt* transshipment". Moreover, the oil in the *Carson* case was stored at a port where the only business conducted was the unloading of oil from railroad tank cars into the storage tanks and the loading of the oil from the storage tanks aboard the tankers for shipment to foreign ports; and the oil was of a higher grade of gasoline than is used in this country generally, and was made especially for export, because the automobiles in England, France and other foreign countries required a higher grade of gasoline than that which was used in this country; none of which factors is present in the case at bar.

In the case at bar, the gasoline, a product of the state of Michigan, was never actually started in the course of continuous transportation to Canada; it was not surrendered to a common carrier for that purpose, and the phrase "For export to Canada", written on the bill of lading by the shipper or the consignee, did not bind the railroad to deliver the commodity in Canada; indeed, it bound no person other

than the Joy Oil Company, Ltd., its officers or those directly in charge of the storage tanks. We respectfully submit that this was merely a self-serving declaration of an interested party whose mind was subject to change at any point in the lengthy period of time during which the gasoline was stored at Dearborn.

Furthermore, the gasoline was stored in the leased tanks for an unreasonable period of 15 to 18 months before it was finally shipped to Canada. Certainly, the fact that the Detroit River is frozen over during a few weeks of the Winter months, was no excuse for the delay.

We respectfully submit that the distinctions between the transactions involved at bar, and those considered by the Court in the cases upon which petitioner relies, are crystal-clear.

Point Two

The Richfield case, and others cited in that opinion, as well as similar decisions mentioned in this brief, determine the correct principles governing exports.

We realize, of course, that unlike taxing measures said to run afoul the Commerce Clause, the constitutional prohibition against "any" tax on exports, found in the Import-Export Clause, cannot be read as containing an implied qualification which might require interstate commerce to "pay its way",

Richfield v. State Board of Equalization, supra,
321 U. S. 69, 78.

Each party at bar relies on the case of *Richfield*, the petitioner for the reason that a state tax on certain California oil products was there deemed to be in direct conflict with the Import-Export Clause, the respondent state board because we believe that the principles of that decision control.

Since the Court is so well-acquainted with the facts involved in this recent case, it would be presumptuous on our part to review them; suffice it to say for the present purpose that the correct principles there accepted as applicable to a problem arising whenever a state tax law and the Import-Export Clause come into collision, or are laid side by side for a judicial determination of which must survive, derive from a few earlier decisions of the Court cited by Mr. Justice Douglas,

Brown v. Houston, 114 U. S. 622;

Coe v. Errol, 116 U. S. 517;

Turpin v. Burgess, 117 U. S. 504;

Cornell v. Coyne, 192 U. S. 418;

Spalding & Bros. v. Edwards, 292 U. S. 66;

and other cases cited in our summary of the argument.

The broad rule laid down in the case of *Coe v. Errol, supra*, and accepted by this Court in *Richfield*, was stated thus:

> "'. . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey'". 116 U. S. 527; 329 U. S. 79.

Or, as in *Cornell v. Coyne, supra*, and stating it another way, see 329 U. S. 79:

> "The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated. The exemption attached to the export and not to the article before its exportation". 192 U. S. 427.

Turning to the facts in *Richfield*, and bearing in mind the controlling principles, we find many distinctions between the situation in that case and the facts in the case at bar. This is clearly shown when we consider the following excerpt from the opinion of Mr. Justice Douglas (329 U. S. 82-83):

> "The foreign purchaser furnished the ship to carry the oil abroad. Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true . . . that at the time of the delivery the vessel was in California waters and was not bound for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. It would not be clearer that the oil had started upon its export journey had it been delivered to a common carrier at an inland point. The means of shipment are unimportant so long as the certainty of the foreign destination is plain".

The contrast is almost startling. In the present case, delivery was not made into the hold of the vessel at the dock, but after delivery to the vendee, the commodity was held in storage for 18 months in all, for 15 months before the tax was imposed, during which lengthy period of time the owner of the gasoline enjoyed the hospitality of the State of Michigan and had the protection of her police and the fire department and police of the City of Dearborn. Although, in the case at bar, control was in a foreign purchaser, the Canadian corporation, there was, again to paraphrase the language of Mr. Justice Douglas, something equivocal in the course of events, if not the initial transaction, which created a probability that the oil might be diverted to domestic use.

Point Three

Applying these principles to the situation here involved, the City of Dearborn was not precluded from imposing the tax in question.

In the case at bar the gasoline had not been shipped in a continuous journey for export, or entered with a common carrier for transportation, or started upon such transportation in a continuous route or journey. It had, in fact, come at rest within the taxing unit for a period of 15 months or more prior to tax day, April 1, 1947, and did not continue its journey until about three months thereafter. During such time, we respectfully submit, it became and was (or continued to be), while in storage, a part of the general mass of the property in the State, and subject to taxation in the usual way.

If an interstate movement (ergo, an export) has not begun, the mere fact that such a movement is contemplated

does not withdraw the property from the State's power to tax it,

Minnesota v. Blasius, 290 U. S. 1.

By way of analogy (applying the rule to interstate commerce):

> "The interstate commerce clause of the Constitution does not give immunity to movable property from local taxation which is not discriminative unless it is in actual continuous transit in interstate commerce. When it is shipped by a common carrier from one state to another, in the course of such an uninterrupted journey, it is clearly immune. The doubt arises when there are interruptions in the journey, and when the property, in its transportation, is under the complete control of the owner during the passage. . . . In other words, in such cases interstate continuity of transit is to be determined by a consideration of the various factors of the situation. Chief among these are the intention of the owner, the control he retains to change the destination, the agency by which the transit is effected, the *actual continuity* of the transportation, and the occasion or purpose of the interruption during which the tax is sought to be levied." [Italics, ours]

Champlain Realty Co. v. Brattleboro, 260 U. S. 366.

In the instant case the property had come to rest in the City of Dearborn, and, at the time of levying the tax, had not been in actual continuity of transportation.

The petitioner presents the argument that the bills of lading upon which the gasoline was shipped showed that the gasoline was destined to be exported to Canada, and

thereby the transaction became one involving foreign commerce, but it should be pointed out that the bill of lading on which a part of the property was shipped showed as its destination Detroit, Michigan, not Toronto, Ontario, or any other place outside of Michigan.

The petitioner was the purchaser and also the consignee of the shipment within the State of Michigan, and on delivery of the gasoline at the place of storage in the City of Dearborn to the petitioner, it was optional with the petitioner whether promptly to ship the gasoline to itself in Canada, or leave it within the State of Michigan for an indefinite period of months, subject only to its convenience and profit—and it chose the latter course. The bill of lading was not a through bill of lading from Alma, Michigan, to Toronto, Canada, but its force and purpose ended when the gasoline was delivered to the consignee, petitioner herein, and placed in storage in petitioner's tanks and under its control in the City of Dearborn. There was no showing that petitioner could not obtain cars to re-ship the gasoline or could not have continued the shipping of the gasoline in the original cars from Alma to Toronto. Having for petitioner's own purpose brought the shipment at rest in his leased tanks in Dearborn, where it was held for approximately fifteen months, we contend the gasoline had not yet taken on the status of a commodity in foreign commerce to exempt it from local taxation.

The petitioner also relies somewhat on

Von Hamm Young Co. v. San Francisco,
29 Cal. 2d 978, 178 P. 2d. 151 ALR 274,

in which case it appears that an interruption of foreign transit resulted from "lack of facilities for immediate transportation", which exempted the cargo from local taxa

tion, but such are not the facts in the case at bar. Here, in the Spring of 1946, the petitioner had been refused further movement of the gasoline over the international bridge by the determination of policy by the persons in control of the Ambassador Bridge and on tax day, April 1, 1947, claimed inability to charter ships for continuance of transportation by water. There was one other mode of transportation left available for the petitioner, which was by rail through the tunnel or across on the ferry between Detroit and Windsor, Canada. If the gasoline market in Canada had been high enough to warrant it, petitioner might have re-shipped the gasoline by rail, but it was to its advantage to keep it in storage in the Dearborn tanks until suitable transportation facilities were available. The available mode of transportation of the gasoline was rejected by Joy Oil as being too expensive, and the gasoline was stored until a ship was chartered by plaintiff and shipment continued from place of storage during July, 1947, to Toronto. We, therefore, contend that until the gasoline was taken out of storage in the Dearborn tanks, it had not become a commodity in foreign commerce, and was therefore subject to the local Dearborn tax.

VII

Conclusion.

For the reasons assigned in this brief, we respectfully submit that the court below was correct in holding that under the circumstances of the case at bar, there was no continuity of transportation from the point of shipment to destination in foreign commerce, and that the gasoline in Dearborn on April 1, 1947, was subject to ad valorem tax. And that the judgment of the Supreme Court of the State of Michigan should be affirmed.

Respectfully submitted,

Eugene F. Black, Attorney
General of the State of Michigan

Edmund E. Shepherd, Solicitor
General of the State of Michigan

Daniel J. O'Hara,
Assistant Attorney General
Counsel for State Tax
Commission.
Lansing, Mich.

Dale H. Fillmore,
Corporation Counsel
of the City of Dearborn

Joel K. Underwood,
Deputy Corporation
Counsel of Dearborn

Of Counsel

APPENDIX

Appendix 'A'

The Michigan General Property Tax Act

Act 206 of the Public Acts of Michigan, 1893, amended by Act 231 of the Public Acts of 1943, (Sec. 3389 Compiled Laws of Michigan, 1929; Sec. 7.1 et. seq. M. S. A.).

Sec. 1. The People of the State of Michigan enact, That all property, real and personal, within the jurisdiction of this state, not expressly exempted, shall be subject to taxation.

Sec. 1(a). This Act shall be known and may be cited as "The General Property Tax Act".

Sec. 8. For the purpose of taxation, personal property shall include: (1) All moneys; (2) All annuities and royalties; (3) All goods, chattels and effects within the State. * * * (13) All other personal property not herein enumerated and not expressly exempted by law.

Sec. 14. (8th). Personal property of non-residents of the State, and all forest products owned by residents or non-residents, or estates of deceased persons, shall be assessed in the township or ward where the same may be to the person, persons, or corporations having control of the premises, store, mill, dockyard, piling ground, place of storage, or warehouse where such property is situated in such township on the second Monday of April of the year when the assessment is made. * * *